94-901

Supreme Court, U.S.
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No. 94-259

In The

Supreme Court of the United States

October Term, 1994

GLEN K. SANDLIN,

Petitioner,

v.

CORPORATE INTERIORS, INC., SVEIN REICHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD, 2601 BLAKE STREET, COLORADO NATIONAL BANK OF DENVER, and INTERIOR SERVICES, INC.,

Respondents.

Petition For Writ Of Certiorari To The Colorado Supreme Court

RESPONDENT COLORADO NATIONAL BANK'S OPPOSITION TO PETITIONER SANDLIN'S PETITION FOR WRIT OF CERTIORARI

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28 U.S.C. § 1257(a) (1988) 1, 2, 5, 6

Respondent Colorado National Bank ("Colorado National"), in response to Petitioner's ("Sandlin" or "Petitioner") Petition for issuance of a writ of certiorari, states as follows:

I. OPINIONS BELOW

Petitioner has failed to cite the Court to two Denver District Court opinions issued in the lawsuit underlying the Colorado Supreme Court's eventual denial of Sandlin's Petition for Writ of Certiorari to that court. In the first, the Denver District Court issued an Opinion and Order granting defendants' Motion for More Definite Statement, and ordering Petitioner to file an Amended Complaint.[1] *Sandlin v. Corporate Interiors*, 92 CV 6282 (Denver Dist. Ct. 1992), Paragraph 3 of Order dated February 8, 1993 (at p. 1 of the Appendix attached hereto). In the second, the Denver District Court issued an Opinion and Order dismissing Petitioner's Amended Complaint. *Id.* Order dated March 26, 1993 (at p. 3 of the Appendix attached hereto).

II. JURISDICTION

It appears Petitioner intended to reference 28 U.S.C. § 1257(a) (1988) as the basis for invoking this Court's

[1] Defendants in the Denver District Court action are the same as the Respondents in Petitioner's Petition to this Court.

jurisdiction.[2] This section of the United States Code does not provide a basis for invoking the Court's jurisdiction. Colorado National's jurisdictional argument is set forth beginning on page 5 of this Response.

III. STATEMENT OF THE CASE

Petitioner's Petition to the United States Supreme Court, which asks for a review of the Colorado Supreme Court's denial of a Petition for Writ of Certiorari, has its roots in an age discrimination action successfully brought in U.S. District Court by Sandlin in 1989 against Corporate Interiors, Inc. After entry of the judgment, Sandlin commenced six years of litigation in an effort to collect the judgment from defendants having nothing to do with the underlying discrimination claim. *Sandlin v. Corporate Interiors*, 89-M-727 (D. Colo. 1989); *Sandlin v. Corporate Interiors*, 90-M-1597 (D. Colo. 1990); *In re Canady*, 90-15194 (Bankr. D. Colo.); *Sandlin v. Canady*, 91-1029 (Bankr. D. Colo.); *Sandlin v. Corporate Interiors*, 92 CV 6282 (Denver Dist. Ct. 1992); *Sandlin v. Corporate Interiors*, 972 F.2d 1212 (10th Cir. 1992); *Sandlin v. Canady*, 1993 WL 26722 (1993); *Sandlin v. Corporate Interiors*, 93 CA 0741 (Colo. Ct. App. 1993).

On September 15, 1992, Sandlin's efforts to collect his 1989 judgment led Sandlin to sue Colorado National in

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[2] In his apparent effort to reference 28 U.S.C. § 1257(a), Petitioner referenced 28 U.S.C. 1257(3), a former, but now non-existent, provision of the United States Code.

state court.[3] Sandlin commenced his state court action by filing an eight-paragraph Complaint against Colorado National and five other defendants who he claimed were responsible for the payment of the 1989 discrimination judgment. Because Sandlin's Complaint failed to delineate a single cause of action or to give any notice to the defendants of which theories had been brought against which defendants, the trial court granted defendants' Motion for More Definite Statement and ordered Sandlin to file an Amended Complaint. *Sandlin v. Corporate Interiors*, 92 CV 6282 (Denver Dist. Ct. 1992), Order dated February 8, 1993 (at p. 1 of the Appendix attached hereto). In its Opinion and Order, the trial court warned that if Sandlin again failed to properly plead his case, it would be dismissed. *Id.*

In response, Sandlin disregarded the trial court's Order. Rather than to allege specific facts, as the trial court had ordered, Sandlin merely purported to incorporate by reference into his Amended Complaint whole categories of documents, exhibits, depositions, and trial testimony. Sandlin failed to attach these items to his Amended Complaint and they were not part of any proceeding to which Colorado National was a party.[4] Sandlin again failed to add any substantive allegations to his claims for relief, leaving defendants without notice of the

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[3] Sandlin had previously sued Colorado National in U.S. District Court; these claims were dismissed on jurisdictional grounds and the dismissal was affirmed by the Tenth Circuit. *Sandlin v. Corporate Interiors*, 972 F.2d 1212 (10th Cir. 1992).

[4] Sandlin's Amended Complaint is set forth in the Appendix to Petitioner's Petition for Writ of Certiorari.

claims brought against them. Because Sandlin's Amended Complaint was not properly pleaded and failed to state claims against defendants, the Denver District Court granted defendants' motions to dismiss for failure to state claims and for failure to comply with the pleading requirements of the Colorado Rules of Civil Procedure. *Id.* Order dated March 26, 1993 (at p. 4 of the Appendix attached hereto).

Sandlin appealed the dismissal of the Amended Complaint to the Colorado Court of Appeals, arguing that he had complied with all applicable pleading requirements. Sandlin also argued for the first time that the trial court was biased against him. The Court of Appeals affirmed the trial court's findings that Sandlin's Amended Complaint failed to state claims in compliance with Colo.R.Civ.P. 8 and 9; the court also refused to address Sandlin's bias argument because it was not properly raised. Thereafter, the Court of Appeals denied Sandlin's Motion for Rehearing. Throughout these proceedings, Sandlin never once raised the issue on which he seeks review in this proceeding: that the trial court denied him his First Amendment right to petition the government for a redress of grievances. Indeed, Sandlin never asserted any federal claims or questions of any kind.

Sandlin then petitioned the Colorado Supreme Court for review by certiorari, arguing he was entitled to invocation of the Supreme Court's powers of supervision because the Court of Appeals "affirmed [the trial court's] Order dismissing Sandlin's case without following, and in blatant violation of, [the Colorado Supreme] Court's procedure for determining the sufficiency of a complaint

on a motion to dismiss." Petition for Writ of Certiorari to Colorado Supreme Court (at p. 22 of the Appendix attached hereto). The Colorado Supreme Court denied this petition. When Sandlin filed a petition for rehearing, the court ordered it stricken. Not until he filed his petition for rehearing did Sandlin assert that the district court had deprived him of his constitutional rights.

IV. SUMMARY OF ARGUMENT

A. This Court does not have jurisdiction over this action because Petitioner failed to raise the arguments underlying his Petition for Writ of Certiorari in the courts below.

B. Alternatively, Petitioner's Petition should be denied because no "special and important" reason pursuant to Supreme Court Rule 10 exists to support this Court's exercise of its discretion to review this matter.

V. ARGUMENT

A. This Court Lacks Jurisdiction Over This Action.

The Petitioner claims this Court has jurisdiction over the issues raised in his Petition pursuant to a now nonexistent section of the United States Code. Assuming Petitioner's reference is intended to be to 28 U.S.C. § 1257(a) (1988), then this Court does not have jurisdiction over this action.

This section provides, in part, that:

> [f]inal judgments . . . by the highest court of the state . . . may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution[.]

28 U.S.C. § 1257(a).[5]

Petitioner is apparently seeking to invoke this Court's jurisdiction by claiming that his rights under the First Amendment of the U.S. Constitution have been abridged. However, petitioner failed to raise any claim that his First Amendment rights had been abridged in either his appeal to the Colorado Court of Appeals or in his Petition for Writ of Certiorari to the Colorado Supreme Court. Not until Petitioner's Petition for Rehearing to the Colorado Supreme Court did Petitioner raise any claim that his constitutional rights had been violated.

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[5] Section 1257(a) of Chapter 28 of the United States Code also provides for review of decisions by the highest state court "where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question . . . or where any title, right, privilege, or immunity is specially set up or claimed under . . . the treaties or statutes of, or any commission held or authority exercised under, the United States." Petitioner's Petition for Writ of Certiorari, however, does *not* call into question the validity or constitutionality of a United States treaty or statute, or treaty or statute of any state, nor does it set forth claims of any "title, right, privilege, or immunity" under any United States statute or treaty or commission. Accordingly, these provisions of 28 U.S.C. § 1257(a) do not give this Court jurisdiction to grant Sandlin's Petition, and are not further addressed in this Response.

Because Petitioner failed to preserve his First Amendment argument for appellate review in the Colorado court system, this Court lacks jurisdiction to review the decision of the Colorado Supreme Court.

It is clear from this Court's opinion in *Wall v. Chesapeake & O. R. Co.*, 256 U.S. 125, 41 S. Ct. 402, 65 L. Ed. 856, 857 (1921), that this Court cannot review an issue which Petitioner failed to present to the state court of last resort for decision. For this Court to have jurisdiction to review the judgment of a state court of last resort, the Petitioner must have properly preserved a constitutional question for review. Specifically, the claimed right must have been called to the state court of last resort's attention *prior* to its final judgment, and the decision of the state court of last resort must have been against the right claimed. It is too late to raise a federal question for the first time in a petition for rehearing to the state court of last resort, after the final judgment of the state court of last resort where it could have been raised earlier. *Wall v. Chesapeake*, 256 U.S. at 126 (jurisdiction to review writ of error not invoked where federal question was first raised in petition for rehearing to the Illinois Supreme Court). *See also, Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117, 43 S. Ct. 288, 67 L. Ed. 556, 563 (1923); *Citizens National Bank v. Durr*, 257 U.S. 99, 106, 42 S. Ct. 15, 16, 66 L. Ed. 149, 152 (1921); *Thornton v. Mississippi*, 323 U.S. 668, 65 S. Ct. 76, 89 L. Ed. 543 (1944); *Carter v. General American Life Ins. Co.*, 323 U.S. 676, 65 S. Ct. 188, 89 L. Ed. 549 (1944); *Putzier v. Richardson*, 323 U.S. 677, 65 S. Ct. 191, 89 L. Ed. 549 (1944); and *Wilson v. Cook*, 327 U.S. 474, 480, 66 S. Ct. 663, 666, 90 L. Ed. 793, 799 (1946).

Because this Court does not have jurisdiction over this action, Petitioner's Petition for Writ of Certiorari must be denied.

B. Alternatively, Petitioner has Failed to State a "Special and Important" Reason for This Court to Grant a Writ of Certiorari.

Pursuant to Rule 10 of the Supreme Court Rules, a review on writ of certiorari is a matter of judicial discretion that will only be had for "special and important" reasons. Sup. Ct. R. 10. Rule 10 states three reasons which indicate the "character of reasons" to be considered by the Supreme Court in ruling on a Petition for Writ of Certiorari. *Id.* Petitioner does not claim to come within any of these articulated reasons, nor does Petitioner present any other "special and important" issue warranting this Court's exercise of its discretion. Instead, Petitioner asks this Court to disregard well-settled precedent on the scope and purpose of the Petition clause of the First Amendment.

1. Petitioner does not fall within the articulated reasons of Rule 10.

Petitioner neither claims that a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals or a state court of last resort nor invokes this Court's supervisory powers. Sup. Ct. R. 10.1(a). Similarly, Petitioner does not claim that a state court of last resort has decided a federal question in a way that conflicts with any articulated

decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10.1(b).

Apparently, Petitioner contends (without saying so) that the Colorado Supreme Court's denial of his Petition for Writ of Certiorari to that court presents an important question of federal law for review. Sup. Ct. R. 10.1(c). But it is well settled that the Petition Clause of the First Amendment does not elevate the routine dismissal of Sandlin's Amended Complaint to constitutional dimensions.

Petitioner's argument seems to be that the Colorado Supreme Court's ruling denied him the right to petition the courts for a redress of grievances by refusing to review the trial court's dismissal of his Amended Complaint. Petitioner's claim, however, confuses "access" with "success." Petitioner is not constitutionally entitled to the latter. "The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate *such rights as he may have,* as opposed to the extent to which rights actually are extended to protect or compensate him." *Bowman v. Niagara Machine & Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) (emphasis in original).

Claims of violation of the right of access to courts focus on the availability of suitable court processes to vindicate existing rights, or more commonly, the ability of an individual to make use of those processes. *Id. See, e.g., Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (requiring prison authorities to provide inmates with adequate law libraries or legal assistance in order to

permit meaningful litigation of appeals from conviction or other constitutional claims); *Bell v. Milwaukee*, 746 F.2d 1205, 1262-63 (7th Cir. 1984) (conspiracy by local officials to conceal information that could have formed the basis for a claim under 42 U.S.C. § 1983).

In contrast, Petitioner does not claim he has been denied access to either state or federal courts to enforce any right that he may have. To the contrary, Petitioner has asserted his claims in the United States District Court, the Tenth Circuit Court of Appeals, the United States Bankruptcy Court, the Colorado District Court, the Colorado Court of Appeals, and the Colorado Supreme Court.

In the state court action giving rise to his Petition, Petitioner had the right under Colorado law to file a Complaint and to proceed to trial if his Complaint stated claims against defendants. After giving Sandlin two opportunities to state a claim, the trial court invoked state law to dismiss Sandlin's case. The Colorado Court of Appeals invoked state law to affirm the trial court's dismissal and the Colorado Supreme Court properly refused to review this ruling on a writ of certiorari.

Petitioner was never denied access to the courts. Instead, Petitioner wilfully failed to comply with state procedural rules in pleading his Complaint and Amended Complaint. Because there is no reason to believe that had Petitioner properly pleaded his case, that a Colorado court and jury would be unavailable and would not do justice between the parties, Petitioner has failed to raise an important federal question for review. *See McDonald v. Smith*, 472 U.S. 479, 484, 485, 105 S. Ct. 2787, 2790, 2791, 86 L. Ed. 2d 384, 390 (1985) (privilege conferred by the

petition clause is not absolute); *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986) (where plaintiff's complaint dismissed for failure to state a claim, plaintiff not denied First Amendment access to the courts or her right to petition the government for redress of grievances).

2. Petitioner's Petition raises no "special" or "important" reason warranting this Court's exercise of its discretion to review the Colorado Supreme Court's decision.

For these and other reasons, Petitioner has failed to raise any "special" or "important" reasons for this Court to exercise its discretion to review the decision of the Colorado Supreme Court. In the lengthy history of this case, Colorado's state courts, including the Denver District Court and the Court of Appeals, merely invoked Colorado state law to require a litigant to comply with the rules of procedure that govern the litigation process. There is nothing unusual or noteworthy about a routine dismissal of a complaint for failure to state a claim.

Other considerations dictate against review as well. First, the Colorado Supreme Court's decision is supportable as a matter of state law and thus is not subject to review by the U.S. Supreme Court. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950). The trial court merely dismissed Sandlin's complaints because they failed to state claims. Second, the decisions of the Colorado courts are not subject to review because they never ruled on a question of federal law. *Id.* Third, Petitioner fails to demonstrate how the Colorado

Supreme Court's denial of his Petition involves any principles the settlement of which is of importance to the public, as distinguished from the parties. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951). Finally, Petitioner has not identified a federal question of substance not previously considered by the Supreme Court, or inconsistent with its decisions. Rather, there is a well developed body of law addressing a litigant's First Amendment right to petition the government for a redress of grievances.

VI. CONCLUSION

This Court does not have jurisdiction over this action. Alternatively, Petitioner's Petition presents no special or important reasons warranting this Court's exercise of its discretion over this action. Accordingly, Colorado National asks that this Court deny Sandlin's Petition for Writ of Certiorari.

Respectfully submitted,

KELLY/HAGLUND/GARNSEY & KAHN LLC

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Dated: December 13, 1994

No. 94-259

In The

Supreme Court of the United States

October Term, 1994

GLEN K. SANDLIN,

Petitioner,

v.

CORPORATE INTERIORS, INC., SVEIN REICHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD, 2601 BLAKE STREET, COLORADO NATIONAL BANK OF DENVER, and INTERIOR SERVICES, INC.,

Respondents.

Petition For Writ Of Certiorari To The Colorado Supreme Court

APPENDIX TO RESPONDENT COLORADO NATIONAL BANK'S OPPOSITION TO PETITIONER SANDLIN'S PETITION FOR WRIT OF CERTIORARI

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DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92CV6282 Courtroom 9

ORDER ON PENDING MOTIONS – FEBRUARY 8, 1993

GLEN K. SANDLIN,

Plaintiff,

v.

CORPORATE INTERIORS, INC., SVEIN REIGHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD, 2601 BLAKE STREET, COLORADO NATIONAL BANK OF DENVER, and INTERIOR SERVICES, INC.,

Defendants.

This case is before the Court on several Motions filed by the parties:

1. Plaintiff's Motion for Reconsideration [of the Court's February 1, 1993, Order] was filed on February 4, 1993. Attached is a date-stamped copy of an Affidavit of Service with Summons and Complaint attached, dated January 20, 1993. It was not in the Court's file when the Court reviewed the matter on February 1, 1993. The Order of Dismissal Without Prejudice of Interior Services, Inc. is VACATED.

2. The Court notes the filing of an Answer by Defendant Interior Services, Inc. on February 4, 1993. The Motion by this Defendant to Hold Complaint in Abeyance Against

Defendant Interior Services, Inc. is DENIED. This Defendant alleges that the same issue of corporate successor liability is pending before the United States Bankruptcy Court in Case No. 91-1029 CEM. That matter has not yet been set for trial and, as far as the Court can determine, there is no automatic stay in effect as to Defendant Interior Services, Inc. The Court will allow this Defendant to rely upon materials which may have been disclosed to the Plaintiff in the federal case in answering discovery requests in this case. If and when there is a decision by the Bankruptcy Court on the issue of corporate successor liability, the Defendant may file whatever motions it deems appropriate. However, the Court will not delay this case as to one Defendant.

3. Defendants' [Corporate Interiors, Inc. and Svein Reichborn] Motion to Dismiss or, alternatively, for More Definite Statement was filed on January 19, 1993. Plaintiff's response was filed on February 5, 1993. Defendants' Motion is GRANTED in that the Court ORDERS that Plaintiff file an Amended Complaint in this case by February 23, 1993. The Amended Complaint shall delineate specific claims for causes of action as defined in the Colorado Jury Instructions, Third Edition, and shall further state against which Defendant[s] the claim is being brought. There appear to be in the eight undelineated paragraphs of the present Complaint, allegations of fraud and civil conspiracy. The Amended Complaint shall plead those claims pursuant to C.R.C.P. 9(b). If the elements of each cause of action identified in the Amended Complaint are not plead, as outlined in CJI 3d, and with the specificity required by the Colorado Rules of Civil Procedure, this action will be dismissed. The Court has no

idea what is being alleged in the present Complaint, although apparently the parties have been living with this case for years in the federal system. Insofar as the Defendants request dismissal of this action, their Motion is DENIED.

4. This case appears now to be at issue. Plaintiff is ORDERED to set the case for trial by February 23, 1993, on a Notice to Set.

DATE: February 8, 1993

BY THE COURT:

/s/ Lynne M. Hufnagel
Lynne M. Hufnagel
District Court Judge

cc: Counsel of Record

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92CV6282 Courtroom 9

ORDER ON PENDING MOTIONS

GLEN K. SANDLIN,

Plaintiff,

v.

CORPORATE INTERIORS, INC., SVEIN REICHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD, 2601 BLAKE STREET, COLORADO NATIONAL BANK OF DENVER, and INTERIOR SERVICES, INC.,

Defendants.

This case is before the Court for review of the Plaintiff's Amended Complaint filed February 23, 1993, in response to the Court's February 8, 1993, written Order. Several Motions from the Defendants followed the filing of the Amended Complaint.

1. The original Complaint in this case was filed on September 25, 1992. It contained eight paragraphs of allegations on three and one-half single-spaced typewritten pages. The Amended Complaint was filed on February 23, 1993, and contains six "Counts" on nine single-spaced typewritten pages.

2. In the Amended Complaint, there are no concise statements identifying the parties and their relationship

to one another. There are no statements regarding jurisdiction or venue. The averments contained in the Amended Complaint are not "simple, concise, and direct" as required by C.R.C.P. 8(e).

3. The only dates stated in the nine pages of the Complaint are "[s]ince at least August of 1983 and continuing to the present" in the first averment of the first count, and dates by month or year in some of the other averments. Because Plaintiff is alleging fraudulent conveyances pursuant to C.R.S. 38-10-117, his averments concerning fraud must "be stated with particularity." C.R.C.P. 9(b). They are not. There is not one identified conveyance identified by property conveyed or date of conveyance or circumstance of conveyance which suggest that fraud was involved. Typical are that vague statements made in paragraphs A, B, D, E, and F under the second averment in Count I, which alleges a civil conspiracy claim. Count II which is a "Statute of Frauds Claim" against all Defendants merely incorporates the previous vague and imprecise allegations of the Count I.

4. Count III is a claim for Breach of Fiduciary Duty against Defendant Svein Reichborn-Kjennerud. Plaintiff alleges that this Defendant, as an officer, director, and shareholder of Defendant Corporate Interiors, Inc., owed a fiduciary duty to him because he was a corporate creditor. It appears from the Complaint that Plaintiff was an adversary of this corporation in a federal civil action. Under such circumstances it is difficult to understand how Defendant Reichborn-Kjennerud could owe any fiduciary duty to Plaintiff, and other than stating the above relationship, Plaintiff in his Complaint does not state how that relationship established such a duty,

breach of which could substantiate this claim. *Alexander v. Packard*, 754 P.2d 780 (Colo.App. 1988); *Walk-In Medical Centers v. Breuer Capital Corporation*, 778 F. Supp. 1116 (D.C. Colo. 1991). Count III, as presently plead, fails to state a claim against this Defendant.

5. Count IV is an "Alter Ego Claim" against Defendants Svein and Sandra Reichborn-Kjennerud and 2601 Blake Street which recites the elements necessary for such a claim but states no specific facts as required by C.R.C.P. 8.

6. Count V is a lender liability claim against Defendant Colorado National Bank alleging that this financial institution exercised excessive control over the business operations of Defendant Corporate Interiors, Inc. thus creating a fiduciary duty in this Defendant to Plaintiff as a creditor. Again, the Court cannot determine how this Defendant, as a creditor of Corporate Interiors could have a fiduciary duty to the Plaintiff as a competing creditor. Plaintiff states no facts to support his allegation of "excessive control". Count V fails to state a claim against Defendant Colorado National Bank.

7. Plaintiff cannot solve his total lack of specific factual statements to support his legal conclusions by incorporating "post judgment Rule 69(a) proceedings in the federal lawsuit referred to in the Third Averment" particularly not when no such statements are repeated in the Complaint and the statements made, allegedly, in sworn testimony, are not appended to the Complaint. Defendants cannot possibly respond intelligently to such an allegation. Likewise, Plaintiff cannot establish the facts for his Complaint by attempting to incorporate "depositions, deposition exhibits, and sworn trial testimony" from a

personal bankruptcy case involving a debtor who is not a party. The Court has no idea who Douglas L. Canady is nor what is contained in the evidence Plaintiff attempts to incorporate.

8. After the filing of the Amended Complaint on February 23, 1993, Defendants Corporate Interiors, Inc., the Reichborn-Kjennerud's, and 2601 Blake Street filed their Motion to Dismiss Plaintiff's Amended Complaint citing the appropriate pleading rules of the Colorado Rules of Civil Procedure. That Motion was filed on March 5, 1993. On March 8, 1993, Defendant Interior Services, Inc. filed its Motion for More Definite Statement or in the alternative, to Strike Portions of or Dismiss the Amended Complaint. This Defendant notes the impossibility of responding to unidentified statements and evidence from other cases which Plaintiff attempts to incorporate into his Complaint. On March 17, 1993, Defendant Colorado National Bank filed its Joinder in Motions to Dismiss Amended Complaint, specifically referring to the lack of specificity alleged in Count I, Civil Conspiracy and Count V, Lender Liability, both of which "as fraud based claims, are subject to the particularity requirements of pleading contained in Rule 9(b)."

9. Plaintiff's response to these Motions was filed on March 19, 1993. It is totally inadequate to refute the grounds stated by the Defendants in their Motions to Dismiss. Plaintiff points to the incorporated evidence from other cases as supporting his argument that the Complaint is specific in its allegations. As stated above, that does not solve Plaintiff's pleading problem because the Court has no clue what it is that is being incorporated.

10. All Defendants' Motions to Dismiss are GRANTED, the Court finding that Plaintiff has failed to state a claim for relief as to certain counts plead and has failed to comply with the Colorado Rules of Civil Procedure, specifically Rules 8 and 9, in all nine pages of his Complaint. Because the Court had previously, in its February 8, 1993, Order given Plaintiff the opportunity to amend his Complaint and submit it in proper form, the Plaintiff will not again be given that opportunity. This case is DISMISSED WITHOUT PREJUDICE. The remaining motions filed by the parties are MOOT.

DATE: March 26, 1993

BY THE COURT:

/s/ Lynne M. Hufnagel
Lynne M. Hufnagel
District Court Judge

cc: Counsel of Record

SUPREME COURT, STATE OF COLORADO

Case No. 945C259

PETITION FOR WRIT OF CERTIORARI

GLEN K. SANDLIN,

Petitioner,

v.

CORPORATE INTERIORS, INC.; SVEIN REICHBORN-KJENNERUD; SANDRA REICHBORN-KJENNERUD; 2601 BLAKE STREET; COLORADO NATIONAL BANK; INTERIOR SERVICES, INC.,

Respondents.

Petitioner Glen K. Sandlin hereby submits the following Petition for Writ of Certiorari:

I. ADVISORY LISTING OF ISSUE PRESENTED FOR REVIEW

Whether the Colorado Court of Appeals has so far departed from the accepted and usual course of judicial proceedings with respect to the issue of determining the sufficiency of a complaint on a motion to dismiss, or so far sanctioned such procedure by Denver District Judge Lynne M. Hufnagel, as to call for the exercise of the Supreme Court's power of supervision.

II. OPINION BELOW

Reference is hereby made to the unpublished Opinion issued by the Court of Appeals on March 3, 1994.

III. JURISDICTION

On April 7, 1994, the Court of Appeals issued its Order denying Mr. Sandlin's Petition for Rehearing (Filed on March 16, 1994). There was no order granting an extension of time within which to petition for certiorari.

IV. STATEMENT OF THE CASE

This case was filed in the Denver District Court on September 25, 1992, District Judge Lynne M. Hufnagel presiding. Mr. Sandlin's Complaint and Jury Demand charged a conspiracy by and among Respondents Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, Colorado National Bank, and Interior Services, Inc. to prevent Mr. Sandlin from enforcing his federal court judgment for intentional and willful age discrimination in employment.

On February 8, 1993, Judge Hufnagel issued the following Order:

> 3. Defendants' [Corporate Interiors, Inc. and Svein Reichborn-Kjennerud] Motion to Dismiss or, alternatively, for More Definite Statement was filed on January 19, 1993. Plaintiff's Response was filed on February 5, 1993. Defendants' Motion is GRANTED in that the Court ORDERS that Plaintiff file an Amended Complaint in this case by February 23, 1993. The

> amended Complaint shall delineate specific claims for causes of action as defined in the Colorado Jury Instructions, Third Edition, and shall further state against which Defendant [s] the claim is being brought. There appear to be in the eight undelineated paragraphs of the present Complaint, allegations of fraud and civil conspiracy. The Amended Complaint shall plead those claims pursuant to C.R.C.P. 9(b). If the elements of each cause of action identified in the amended Complaint are not pled, as outlined in CJI 3d, and with the specificity required by the Colorado Rules of Civil Procedure, this action will be dismissed. The Court has no idea what is being alleged in the present Complaint, although apparently the parties have been living with this case for years in the federal system. Insofar as the Defendants request dismissal of this action, there Motion is DENIED.

On February 23, 1993, Mr. Sandlin filed his Amended Complaint setting forth six specific counts or claims as causes of action: conspiracy, statute of frauds, breach of fiduciary duty, alter ego, lender liability, and successor liability. Each count or claim named the parties against whom the count or claim was being brought, and included separate numbered averments with separate lettered subparts. While the portion of Judge Hufnagel's Order requiring Mr. Sandlin to "delineate specific claims for causes of action as defined in the Colorado Jury Instructions, Third Edition" was impossible to comply with,[1] each cause of action was pled with the specificity

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[1] CJI 3rd does not define the elements of the causes of action for the claims being pursued by Mr. Sandlin.

required by the Colorado Rules of Civil Procedure, including C.R.C.P. 9(b).

On March 26, 1993, Judge Hufnagel issued the following Order:

> 10. All Defendants' Motions to Dismiss are GRANTED, the Court finding that Plaintiff has failed to state a claim for relief as to certain counts pled and has failed to comply with the Colorado Rules of Civil Procedure, specifically Rules 8 and 9, in all nine pages of his Complaint. Because the Court had previously, in its February 8, 1993, Order given Plaintiff the opportunity to amend his Complaint and submit it in proper form, the Plaintiff will not again be given that opportunity. This case is DISMISSED WITHOUT PREJUDICE. The remaining motions filed by the parties are MOOT.

Mr. Sandlin subsequently appealed, and on March 3, 1994, the Court of Appeals issued its unpublished Opinion affirming Judge Hufnagel's (March 26, 1993) Order dismissing Mr. Sandlin's case.

III. ARGUMENT

The Court of Appeals found and concluded that Mr. Sandlin's Amended Complaint failed to give the Respondents adequate notice of the events or transactions upon which he based his claims. However, Count I of Mr. Sandlin's Amended Complaint stated as follows:

> *First Averment*: Since at least August of 1983 and continuing to the present, Defendants Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601

Blake Street, Colorado National Bank, and Interior Services, Inc. have engaged in a course of concerted conduct amounting to a conspiracy with each other and with unknown third persons for the purpose of making, or causing to be made, conveyances of and charges upon the property of Defendant Corporate Interiors, Inc. with the intent to hinder, delay, and defraud creditors and other persons, including Plaintiff Glen K. Sandlin, of their lawful suits, damages, forfeitures, debts, and demands, in violation of C.R.S. § 38-10-117.[2]

Second Averment: One or more persons or entities engaged in the conspiracy alleged in the foregoing First Averment did, or caused to be done, the following acts in furtherance of the object of such conspiracy, whereby Plaintiff Glen K. Sandlin was injured in his person or property:

A. On numerous occasions between August of 1983 and August of 1989, Defendants Svein Reichborn-Kjennerud, made unauthorized pledges of property owned by Defendant Corporate Interiors, Inc. as collateral for loans made by Defendant Colorado National Bank to Defendant 2601 Blake Street to finance Defendant 2601 Blake Street's real estate transactions. At all times relevant to these unauthorized pledges of property, Defendant Svein Reichborn-Kjennerud, was officer, director, and shareholder of Defendant Corporate Interiors, Inc., and was also general partner with his

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[2] Respondent Interior Services, Inc. did not join the conspiracy until November of 1989.

wife, Defendant Sandra Reichborn-Kjennerud, in Defendant 2601 Blake Street. Defendant Colorado National Bank made the loan to Defendant 2601 Blake Street despite its knowledge of the unauthorized pledges of property. Defendants Svein Reichborn-Kjennerud, and Sandra Reichborn-Kjennerud, were personal guarantors on the loans.

B. Beginning in August of 1989 and continuing through at least April of 1990, Defendants Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, Colorado National Bank, and Interior Services, Inc. sold and otherwise made, or caused to be made, conveyances of and charges upon the property of Defendant Corporate Interiors, Inc. At all times relevant to these conveyances and charges, Defendant Svein Reichborn-Kjennerud was officer, director, and shareholder of Defendant Corporate Interiors, Inc., and was general partner with his wife, Defendant Sandra Reichborn-Kjennerud, in Defendant 2601 Blake Street. Defendants Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, Colorado National Bank, and Interior Services, Inc. aided, abetted, and participated in these conveyances and charges despite the fact that they knew that Defendant Corporate Interiors, Inc. was insolvent, and despite the fact that they knew that Plaintiff Glen K. Sandlin had filed, in May of 1989, a federal lawsuit alleging age discrimination in

employment against Defendant Corporate Interiors, Inc.

C. In October of 1989, Defendant Svein Reichborn-Kjennerud and his attorneys successfully delayed the trial of Plaintiff's federal lawsuit alleging age discrimination in employment against Defendant Corporate Interiors, Inc. from October of 1989 to June of 1990 so that the property owned by Defendant Corporate Interiors, Inc. could be sold and the proceeds from the sale of the property could be applied to assist in the repayment of the loans made by Defendant Colorado National Bank to Defendant 2601 Blake Street before the trial and entry of judgment. Defendant Colorado National Bank knew that the trial was being delayed, and aided, abetted, and participated in the delay.

D. In late 1989 and early 1990, Defendants Svein Reichborn-Kjennerud, and Colorado National Bank conveyed a substantial portion of the remaining assets of Defendant Corporate Interiors, Inc. to Defendant Interior Services, Inc., which continued Defendant Corporate Interiors, Inc.'s business at the same location in Denver, Colorado with essentially the same jobs, employees, and supervisors under essentially the same working conditions. At all times relevant to the conveyance of assets, Defendant Interior Services, Inc. knew about Plaintiff Glen K. Sandlin's federal lawsuit alleging age discrimination in employment against Defendant Corporate

Interiors, Inc. Defendants Svein Reichborn-Kjennerud, Colorado National Bank, and Interior Services, Inc. entered into the conveyance of assets fraudulently to attempt to escape liability for the debts of Defendant Corporate Interiors, Inc., including liability for the age discrimination claim being pursued by Plaintiff Glen K. Sandlin in federal court.

E. In April of 1990, Defendants Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, and Colorado National Bank entered into a written agreement requiring the proceeds from the sale of the property owned by Defendant Corporate Interiors, Inc. to be used to assist in the repayment of the loans made by Defendant Colorado National Bank to Defendant 2601 Blake Street. While the agreement permits Defendants Svein Reichborn-Kjennerud and Sandra Reichborn-Kjennerud, who are personal guarantors on the loans, to pay off the remaining balance on the loans and thus prevent foreclosure on their home in Denver, Colorado, no provision is made or consideration given for paying off the creditors of Defendant Corporate Interiors, Inc., including Plaintiff Glen K. Sandlin.

F. Subsequent to the April of 1990 agreement, Defendants Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, and Colorado National Bank applied the proceeds from the sale of the property owned by Defendant Corporate Interiors, Inc. to assist in the repayment of the loans made by Defendant Colorado

National Bank to Defendant 2601 Blake Street. Upon information and belief, Defendant Colorado National Bank has not foreclosed on the home of Defendants Svein Reichborn-Kjennerud and Sandra Reichborn-Kjennerud to pay off the remaining balance on the loans.

Third Averment: As the result of the wrongful actions alleged in the foregoing First and Second Averments, Defendant Corporate Interiors, Inc. has been divested of its assets, and Plaintiff Glen K. Sandlin has been unable to collect the judgment entered in his favor in the federal lawsuit alleging age discrimination in employment against Defendant Corporate Interiors, Inc. This judgment was entered on June 28, 1990, and was in the amount of $142,226.00 plus interest at the legal rate of 8.24% per annum. The Plaintiff has also been unable to collect the attorney fees of $26,425.00 and costs of $830.60 awarded in his favor in the federal lawsuit.

Fourth Averment: In sworn testimony at the postjudgment Rule 69(a) proceedings in the federal lawsuit referred to in the foregoing Third Averment, Defendants Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, 2601 Blake Street, Colorado National Bank, and Interior Services, Inc. made numerous statements and identified numerous exhibits relevant to the wrongful actions alleged in the foregoing First, Second, and Third Averments. These statements and exhibits are incorporated into this Count I by reference for all purposes.

Fifth Averment: Plaintiff Glen K. Sandlin did not discover the wrongful actions alleged in

> the foregoing First, Second, and Third Averments until August and September of 1990 during the postjudgment Rule 69(a) proceedings referred to in the foregoing Fourth Averment.[3] Additional evidence was discovered during the personal bankruptcy case of Douglas L. Canady, who was officer, director, and shareholder of Defendant Interior Services, Inc. This evidence, which is in the form of depositions, deposition exhibits, and sworn trial testimony, is incorporated into this Count I by reference for all purposes.

The Court of Appeals misapprehended or overlooked the foregoing averments in finding and concluding that Mr. Sandlin's Amended Complaint failed to give the Respondents adequate notice of the events or transactions upon which he based his claims.

The Court of Appeals found and concluded that the breach of fiduciary duty allegations failed to indicate what duty Respondents Svein Reichborn-Kjennerud had to Mr. Sandlin, or how it was breached, under "any theory of law." However, Count III of Mr. Sandlin's Amended Complaint stated as follows:

> *First Averment*: Plaintiff Glen K. Sandlin hereby realleges the First, Second, Third, Fourth, and Fifth Averments of the foregoing

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[3] On November 30, 1990, United States District Judge Richard P. Matsch dismissed Plaintiff's postjudgment Rule 69(a) proceedings and separate collection action for lack of ancillary jurisdiction. The United States Court of Appeals for the Tenth Circuit affirmed Judge Matsch's dismissals on August 18, 1992, and Plaintiff's petition for rehearing was denied on September 21, 1992.

Count I, and realleges the First and Second Averments of the foregoing Count II.

Second Averment: At all times relevant to the wrongful actions alleged in the foregoing First Averment, Defendant Svein Reichborn-Kjennerud was officer, director, and shareholder of Defendant Corporate Interiors, Inc., and owed a fiduciary duty to corporate creditors not to divest corporate property for his own use or benefit, or for the use or benefit of related persons or entities, and thereby defeat the claims of corporate creditors.

Third Averment: Beginning in August of 1989 and continuing through at least April of 1990, Defendant Svein Reichborn-Kjennerud breached the fiduciary duty referred to in the foregoing Second Averment by aiding, abetting, and participating in the sale and other conveyances of and charges upon the property of Defendant Svein Reichborn-Kjennerud thus divested corporate property for his own use or benefit, or for the use or benefit of related persons or entities, and thereby defeated the claims of corporate creditors, including Plaintiff Glen K. Sandlin.

As officer, director and shareholder of Respondent Corporate Interiors, Inc. – an insolvent corporation – Respondent Svein Reichborn-Kjennerud owed a fiduciary duty to corporate creditors, including Mr. Sandlin, not to divest corporate property for his own use or benefit, or for the use or benefit of related persons or entities, and thereby defeat the claims of corporate creditors. *Ficor Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982); *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988); *B & K Distributing v. Drake*

Building Corp., 654 P.2d 324 (Colo. App. 1982); *Rosebud Corporation v. Boggio*, 561 P.2d 367 (Colo. App. 1977); *Crowley v. Green*, 365 P.2d 230 (1961). The Court of Appeals misapprehended or overlooked the foregoing points of law and fact in finding and concluding that the breach of fiduciary duty allegations failed to indicate what duty Respondent Svein Reichborn-Kjennerud had to Mr. Sandlin, or how it was breached, under "any theory of law."

The Court of Appeals found and concluded that the lender liability allegations failed to indicate what duty Respondent Colorado National Bank had to Mr. Sandlin, or how it was breached, under "any theory of law." However, Count V of Mr. Sandlin's Amended Complaint stated as follows:

> *First Averment*: Plaintiff Glen K. Sandlin hereby realleges the First, Second, Third, Fourth, and Fifth Averments of the foregoing Count I, realleges the First and Second Averments of the foregoing Count II, realleges the First, Second, and Third Averments of the foregoing Count III, and realleges the First, Second, and Third Averments of the foregoing Count IV.
>
> *Second Averment*: Since at least August of 1989, Defendant Colorado National Bank has exercised excessive control over the business operations of Defendant Corporate Interiors, Inc., thus creating a fiduciary duty in Defendant Colorado National Bank to the creditors of Defendant Corporate Interiors, Inc., including Plaintiff Glen K. Sandlin.
>
> *Third Averment*: Defendant Colorado National Bank has breached the fiduciary duty

> alleged in the foregoing Second Averment by aiding, abetting, and participating in the wrongful actions alleged in the foregoing First Averment.

By exercising excessive control over the business operations of Respondent Corporate Interiors, Inc. – an insolvent corporation – Respondent Colorado National Bank occupied a fiduciary relationship to corporate creditors, including Mr. Sandlin. *Id.* The Court of Appeals misapprehended or overlooked the foregoing points of law and fact in finding and concluding that the lender liability allegations failed to indicate what duty Respondent Colorado National Bank had to Mr. Sandlin, or how it was breached, under "any theory of law."

In *Shapiro and Meinhold v. Zartman,* 823 P.2d 120 (Colo. 1992), this Court said:

> 'A short and plain statement of the claim showing that the pleader is entitled to relief' is all that C.R.C.P. 8(a)(2) requires. *See Hinsey v. Jones,* 159 Colo. 326, 329, 411 P.2d 242, 244 (1966). In determining a motion to dismiss a complaint, a court must accept all averments of material fact contained in the complaint is true. C.R.C.P. 12(b)(5). *Board of County Comm'rs v. City of Thornton,* 629 P.2d 605, 609 (Colo. 1981). A complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief. *Dillinger v. North Sterling Irrigation Dist.,* 135 Colo. 100, 101, 308 P.2d 608, 609 (1957). The same standards for determining a motion to dismiss apply to both the trial court and the appellate court. *See Espinoza v. O'Dell,*

633 P.2d 455, 467 (Colo. 1981); *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437 (1969).

Id. at 122-23.

In the present case, the Court of Appeals affirmed Judge Hufnagel's (March 26, 1993) Order dismissing Mr. Sandlin's case without following, and in blatant violation of, this Court's procedure for determining the sufficiency of a complaint on a motion to dismiss. The Court of Appeals has therefore so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Hufnagel, as to call for the exercise of this Court's power of supervision.

Dated this 6th day of May, 1994.

Respectfully submitted,

/s/ David L. Smith
David L. Smith (#006934)
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1994, true and correct copies of the foregoing Petition for Writ of Certiorari were placed in the United States mail, postage prepaid, addressed as follows:

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/s/ David L. Smith

COLORADO COURT OF APPEALS
No. 93CA0741

March 3, 1994
NOT SELECTED FOR PUBLICATION

Glen K. Sandlin,

Plaintiff-Appellant,

v.

Corporate Interiors, Inc.; Svein Reichborn-Kjennerud; Sandra Reichborn-Kjennerud; 2601 Blake Street; Colorado National Bank of Denver; and Interior Services, Inc.,

Defendants-Appellees.

Appeal from the District Court of the
City and County of Denver
Honorable Lynne M. Hufnagel, Judge
No. 92CV6282

Division III — JUDGMENT AFFIRMED
Opinion by JUDGE TAUBMAN
Criswell and Davidson, JJ., concur

David L. Smith, Denver, Colorado, for Plaintiff-Appellant

Senn Lewis Visciano & Strahle, P.C., Frank W. Visciano, Brian J. Reichel, Denver, Colorado, for Defendants-Appellees Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud, and 2601 Blake Street

Kelly/Haglund/Garnsey & Kahn, James W. Hubbell, Valissa A. Tsoucaris, Denver, Colorado, for Defendant-Appellee Colorado National Bank

No Appearance for Defendant-Appellee Interior Services, Inc.

Plaintiff, Glen K. Sandlin, appeals the dismissal of his complaint against defendants, Corporate Interiors, Inc.; Svein and Sandra Reichborn-Kjennerud; 2601 Blake Street; Colorado National Bank; and Interior Services, Inc. We affirm.

Plaintiff filed a complaint which contained eight numbered paragraphs of allegations on three and one-half single-spaced typewritten pages. The prayer for relief contained ten claims in a single paragraph covering about one-half page. As best we can determine, plaintiff alleged that he had obtained a judgment in federal court against defendant Corporate Interiors, Inc., but had not been able to collect it due to defendants' unspecified actions or inactions.

The trial court ordered plaintiff to file an amended complaint delineating specific causes of action "as defined in the Colorado Jury Instructions, Third Edition," stating against which defendants the claims were brought, and complying with the Colorado Rules of Civil Procedure. The court stated that it had "no idea what is being alleged" and that the action would be dismissed if a proper amended complaint were not filed.

Plaintiff then filed an amended complaint alleging six numbered counts: a conspiracy claim against all defendants; a "statute of frauds" claim against all defendants; a breach of fiduciary duty claim against Svein Reichborn-Kjennerud; an "alter ego" claim against the Reichborn-Kjenneruds and 2601 Blake Street; a "lender liability" claim against Colorado National Bank; and a "successor liability" claim against Interior Services, Inc. The amended complaint referred to sworn testimony, exhibits,

and depositions in "postjudgment Rule 69(a) proceedings in the federal lawsuit" and the "personal bankruptcy case of Douglas L. Canady, who was officer, director, and shareholder of Defendant Interior Services, Inc." The amended complaint purported to incorporate those items "by reference for all purposes," although none was attached.

Defendants moved to dismiss the amended complaint or for a more definite statement. Plaintiff responded that, although his claims were not defined in the Colorado Jury Instructions, they were stated with the required specificity and in compliance with the trial court's order.

The trial court found that plaintiff's amended complaint failed to comply with the requirements of C.R.C.P. 8 and 9 as to all claims and also failed to state a claim for relief as to breach of fiduciary duty against Svein Reichborn-Kjennerud and lender liability against Colorado National Bank. The court noted that there were no concise statements identifying the parties or their relationship to one another, no statements regarding jurisdiction or venue, and the averments were not "simple, concise, and direct." Although the plaintiff alleged fraudulent conveyances, none was identified by date, property conveyed, or circumstances to suggest that fraud was involved. Because the prior order gave plaintiff the opportunity to submit a proper amended complaint and he failed to do so, the trial court dismissed the complaint.

Plaintiff contends that his amended complaint complied with the pleading requirements of the prior order,

the Colorado Rules of Civil Procedure, and applicable case law. We disagree.

In reviewing the trial court's dismissal of the complaint, we must view the allegations of the complaint as true and in a light most favorable to the plaintiff. The complaint cannot be dismissed unless it appears that the plaintiff is entitled to no relief under any statement of facts which may be proved in support of the claims. *National Camera, Inc. v. Sanchez*, 832 P.2d 960 (Colo. App. 1991).

A complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief and apprises the defendant of the nature of the claim and the events or transactions relied upon. *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992); *Eliminator, Inc. v. 4700 Holly Corp.*, 681 P.2d 536 (Colo. App. 1984).

C.R.C.P. 8 provides that pleadings which set forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief, and each averment of a pleading shall be simple, concise, and direct.

C.R.C.P. 9(b) requires that in all averments of fraud, the circumstances constituting the fraud shall be stated with particularity. Particularity is required as to all material elements of a fraud action. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987).

The complaint need not set forth all the evidence that may be adduced to prove fraud, but it must state the

main facts or incidents which constitute the fraud. *Fidelity Finance Co. v. Groff*, 124 Colo. 223, 235 P.2d 994 (1951).

Here, as noted by the trial court, plaintiff's amended complaint did not comply with those rules. *See Borwick v. Bober*, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Plaintiff's attempt to incorporate documents which were not attached to the amended complaint was ineffective to supply the necessary averments. *See* C.R.C.P. 10(c); *cf., Borwick v. Bober, supra.*

Thus, even construing the pleading in plaintiff's favor as we must, *see* C.R.C.P. 8(f); *Spomer v. City of Grand Junction*, 144 Colo. 207, 355 P.2d 960 (1960), we conclude that the amended complaint did not give defendants adequate notice of the transactions upon which plaintiff based his claims.

Plaintiff is correct that specific statements as to venue, jurisdiction, and the relationship of the parties were not necessary here, *see* C.R.C.P. 8(a), and causes of action other than those described in the Colorado Jury Instructions may be alleged, *see* C.R.C.P. 51.1(2); *CJI-Civ. 3d* (1988) (General Directions for Use) (form jury instructions are not all-inclusive or encyclopedic). Also, to the extent plaintiff sought equitable relief, *CJI-Civ. 3d* is inapplicable. *See e.g. CJI-Civ. 3d* 31:4 (Notes on Use) (since promissory estoppel is an equitable claim, no instruction provided).

Nonetheless, we agree with the trial court that plaintiff's amended complaint failed to show that he was entitled to some relief "upon any theory of law." *Cf.*

Borwick v. Bober, supra (when with "diligent and exhaustive study," the court was able to understand plaintiff's pleadings and theory of the case, it was error to dismiss the complaint). Not only were the allegations insufficiently pled, but the breach of fiduciary duty and lender liability allegations failed to indicate what duty defendants had to plaintiff or how it was breached, under "any theory of law."

Therefore, the amended complaint failed to state claims upon which relief could be granted, and the action was properly dismissed. *See* C.R.C.P. 12(e) (if order for more definiteness or particularity is not obeyed, the court may strike the pleading or make such order as it deems just).

Plaintiff also contends that the trial court was biased and discriminated against him in dismissing his lawsuit. We do not address that contention, as it is raised for the first time on appeal. *See* C.R.C.P. 97; *Christensen v. Hoover*, 643 P.2d 525 (Colo. 1982).

The judgment is affirmed.

JUDGE CRISWELL and JUDGE DAVIDSON concur.

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 93CA0741

ORDER

GLEN K. SANDLIN V CORPORATE INTERIORS, INC., ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including May 09, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Taubman, J.

Criswell, J.

Davidson, J.

DATED: April 07, 1994

(seal)